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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN re COUNTRYWIDE FINANCIAL
 CORP. MORTGAGE-BACKED
 SECURITIES LITIGATION

Case No. 11-ML-02265-MRP (MANx)

**COUNTRYWIDE DEFENDANTS’
 REPLY MEMORANDUM IN
 SUPPORT OF THEIR MOTION TO
 DISMISS PLAINTIFFS’ AMENDED
 COMPLAINT**

Date/Time: May 17, 2012 / 11:00 a.m.
 Courtroom: 12
 Judge: Hon. Mariana R. Pfaelzer

THRIVENT FINANCIAL FOR
 LUTHERANS, *et al.*,

Plaintiffs,

v.

COUNTRYWIDE FINANCIAL
 CORPORATION, *et al.*,

Defendants.

Case No. 11-CV-07154-MRP (MANx)

ARGUMENT

In its February 17, 2012 order, this Court dismissed as inadequately pled the following claims in this case without prejudice: (1) fraudulent misrepresentation, reckless misrepresentation, and fraudulent inducement claims that concern title transfer allegations; (2) aiding and abetting fraud claims against all Defendants; and (3) negligent misrepresentation claims against all Defendants. *See* Order re: Motions to Dismiss, dated February 17, 2012, Docket No. 170 (“Dismissal Order”), at 9-12. Plaintiffs’ decision not to amend these deficient claims (*see* Amended Complaint (“AC”) at 1 n.1) warrants that they now be dismissed *with prejudice*. *See Pratts v. Sujana*, 176 F.3d 484, 1999 WL 274662, at *1 (9th Cir. Apr. 23, 1999) (unpublished); *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981); *accord Dietz v. Beneficial Loan & Thrift Co.*, 2011 WL 6739504, at *3 (D. Minn. Dec. 22, 2011).

Plaintiffs do not dispute this, merely incorporating by reference “all of [the] arguments set forth in [their] opposition to Defendants’ initial motions to dismiss”—arguments that this Court has already considered and rejected in its Dismissal Order. *See* Opp. at 1; Dismissal Order at 9-10 (title transfer claims), 10-11 (aiding and abetting claims), and 11-12 (negligent misrepresentation claims).¹ Having failed even to attempt to cure the deficiencies this Court identified in its Dismissal Order, Plaintiffs implicitly have conceded that these claims should be dismissed now with prejudice. *See In re Century Aluminum Co. Sec. Litig.*, 2011 WL 830174, at *6, *8 (N.D. Cal. Mar. 3, 2011) (dismissing plaintiffs’ Section 11 claim with prejudice when “[p]laintiffs were given the opportunity to, but failed to explain in their TAC how they intended to trace their shares to the Secondary Offering” and “spen[t] the vast majority of their Opposition explaining why th[e] Court’s Order” requiring

¹ Plaintiffs also state that they “reserve[] all appellate rights with respect to these claims, including the right to argue that the [Dismissal] Order was decided incorrectly.” Opp. at 1-2.

1 such allegations was wrong rather than “providing the Court with facts explaining
 2 how they will trace their purchases”); *O. Thronas, Inc. v. Blake*, 2010 WL 3185118,
 3 at *6, *9 (D. Haw. Aug. 10, 2010) (dismissing plaintiffs’ RICO claim with prejudice
 4 when “[p]laintiffs [] failed to cure the deficiencies in their complaint” and “raise[d]
 5 essentially the same arguments in their opposition to Defendants’ newest motion to
 6 dismiss”).

7 CONCLUSION

8 For all the reasons set forth above, the Countrywide Defendants respectfully
 9 request that the Court dismiss with prejudice Plaintiffs’ fraudulent
 10 misrepresentation, reckless misrepresentation, and fraudulent inducement claims
 11 based on title transfer allegations, as well as Plaintiffs’ negligent misrepresentation
 12 and aiding and abetting claims.

13 Dated: May 4, 2012

GOODWIN PROCTER LLP

14 /s/ Brian E. Pastuszewski

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12 CWMBS, Inc.

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15

16 IN re COUNTRYWIDE FINANCIAL
17 CORP. MORTGAGE-BACKED
SECURITIES LITIGATION

Case No. 11-ML-02265-MRP (MANx)

PROOF OF SERVICE

18
19 Date: May 17, 2012
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21 THRIVENT FINANCIAL FOR
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22 *Plaintiffs,*
23 v.
24 COUNTRYWIDE FINANCIAL
CORPORATION, *et al.*,
25 *Defendants.*

Case No. 11-07154-MRP (MANx)

PROOF OF SERVICE

I, Mayrav Herman, declare:

I am employed in San Francisco County California. I am over the age of 18 and not a party to the within action. My business address is Three Embarcadero Center, San Francisco, CA 94111.

On **May 4, 2012**, I served the following document on the persons listed on the service list as follows:

COUNTRYWIDE DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

- ☐ (MAIL) I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at San Francisco, California.
- ☐ (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above, with fees for overnight delivery paid or provided for.
- ☐ (MESSENGER SERVICE) I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed and provided them to a professional messenger service for service. A separate Personal Proof of Service provided by the professional messenger service will be filed under separate cover.
- ☐ (FACSIMILE) Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- ☐ (E-MAIL or ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

1 ☒ (CM/ECF Electronic Filing) I caused the above document(s) to be
2 transmitted to the office(s) of the addressee(s) listed above by electronic
3 mail at the e-mail address(es) set forth above pursuant to
4 Fed.R.Civ.P.5(d)(1). "A Notice of Electronic Filing (NEF) is generated
5 automatically by the ECF system upon completion of an electronic filing.
6 The NEF, when e-mailed to the e-mail address of record in the case, shall
7 constitute the proof of service as required by Fed.R.Civ.P.5(d)(1). A copy of
8 the NEF shall be attached to any document served in the traditional manner
9 upon any party appearing pro se."

10
11 I declare under penalty of perjury that I am employed in the office of a
12 member of the bar of this Court at whose direction this service was made and that
13 the foregoing is true and correct.

14 Executed on **May 4, 2012**, at San Francisco, California.

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Mayrav Herman
(Type or print name)


(Signature)

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